



**DEPARTMENT OF TRANSPORTATION**

**4910-9X**

**Office of the Secretary**

**49 CFR Part 10**

**[Docket No. OST-2016-0028]**

**RIN: 2105-AE76**

**Maintenance of and Access to Records Pertaining to Individuals**

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** On February 6, 2019, the U.S. Department of Transportation (DOT) is-  
sued a notice of proposed rulemaking requesting comment on proposed exemptions from the Privacy Act's requirement that individuals have access to certain records maintained within a system of records for the Department's Aviation Consumer Complaint Application Online System. This exemption is necessary to avoid disclosure of aviation compliance inquiry techniques, confidential information provided by air carriers and third parties, and prevent unwarranted invasions of individual privacy. This exemption also supports the Department's ability to obtain information relevant to resolving concerns related to an air carrier's compliance with the Department's consumer protection and civil rights requirements. The Department received two comments on this proposed rule. Upon consideration of the comments, the Department will finalize the proposed rule without change.

**DATES:** This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may access docket number DOT-OST-2016-0028 by any of the following methods:

- Federal Rulemaking Portal: Go to <https://www.regulations.gov>.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Claire Barrett, Departmental Chief Privacy Officer, Office of the Chief Information Officer, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590 or [privacy@dot.gov](mailto:privacy@dot.gov) or (202) 366-8135.

**SUPPLEMENTARY INFORMATION:** DOT identifies a system of records that is exempt from one or more provisions of the Privacy Act (pursuant to 5 U.S.C. 552a(j) or (k)) both in the system of records notice published in the Federal Register for public comment and in an appendix to DOT's regulations implementing the Privacy Act (49 CFR part 10, appendix). This rule exempts records in the Aviation Consumer Complaint Application Online System from subsection (d) (Access to Records) of the Privacy Act to the extent that records consist of investigatory material compiled for law enforcement purposes in accordance with 5 U.S.C. 552a(k)(2).

DOT received two comments on the proposal. These comments were submitted by law students. One commenter, commenting anonymously, stated that she was commenting

for a class assignment. While the commenter stated that he or she did not feel qualified to comment, the commenter expressed concern that the Department is tracking individuals who issue complaints against airlines. The commenter also asks that the Department ensure that any person who submits a complaint have access to the file in accordance with the Freedom of Information Act.

DOT's Office of the Assistant General Counsel for Aviation Enforcement and Proceedings monitors compliance with and investigates violations of Federal law and regulations related to aviation economic, consumer protection, and civil rights requirements. The Aviation Consumer Protection Division is housed within this Office and is tasked with receiving complaints from the public regarding air carrier consumer issues, including complaints of unlawful discriminatory treatment in air travel by airline employees or contractors, and verifying air carriers' compliance with aviation consumer protection requirements. DOT maintains information about individuals who submit complaints so that DOT can appropriately address the complaint, including working with the complainant and air carrier to resolve the issue identified in the complaint and to follow up with the complainant for additional information or to inform the complainant of DOT's analysis of the issue. DOT does not "track" persons who issue complaints against airlines, but rather, uses information about the complainant to assist the complainant to resolve the complaint. Individuals who wish to complain, but are not seeking DOT assistance to address their complaint with the air carrier, may submit complaints anonymously. As the commentator noted, individuals may file a request under the Freedom of Information Act to obtain access to information about them that is maintained in this system of records.

The second comment is from two law students, who also wrote to express concern with the proposed rule. These students stated that they are concerned that the proposed exemption from the Privacy Act's access requirement creates an impediment to potential litigants right to discovery under the Federal Rules of Civil Procedure, and that DOT's discretion to disclose information notwithstanding the Privacy Act exemption does not assuage their concern. The commenters state further that the rule does not serve DOT's interest in supporting DOT's ability to conduct investigations, and undermines the public's right of access to information. The commenters are concerned that the proposal would preclude individuals from being informed consumers by shielding from the public information about patterns of impermissible behavior by airlines.

The Privacy Act, among other things, requires that Federal agencies provide individuals with access to information about themselves that is maintained by the agency in a system of records. Individuals who request information about themselves maintained in a system of records are sometimes referred to as "first party requesters." Under the Privacy Act, a system of records is information about an individual that includes that individual's name or other identifying particular assigned to the individual, such as a photograph, that is retrieved by the agency by that individual's name or other identifier assigned to the individual.

The Aviation Consumer Complaint Application Online System is a system of records that consists primarily of information provided by the individual who submitted a complaint. It also includes information provided by the air carrier identified in the consumer complaint that is provided to DOT as part of DOT's efforts to help assess and resolve the consumer complaint. In the course of responding to a consumer complaint, air carriers

sometimes provide DOT with information that can include identifying information about the air carrier's employees and third parties, or confidential business information. Air carriers provide this information to the DOT voluntarily, and it aids DOT's efforts to resolve particular consumer complaints. If DOT could not protect from a first party requester the identities of third parties or an air carrier's confidential business information provided by an air carrier in the course of responding to a complaint, it would impair DOT's ability to adequately assess and respond to a consumer complaint on behalf of the consumer. Notwithstanding the proposed exemption from the Privacy Act, first party requesters are still entitled to information maintained in this system of records to the full extent required by the Freedom of Information Act. With respect to the commenter's concern about discovery for litigation purposes, this proposed exemption does not limit a private litigant's ability to seek discovery directly from an air carrier. Nor does it restrict access to information from this system, or other agency records that are not part of this system of records, under the Freedom of Information Act. This exemption also does not restrict access that is otherwise provided for under the Privacy Act, which includes disclosures pursuant to court order.

The commenters express particular concern about information demonstrating a pattern of unlawful conduct by an air carrier. The Department agrees that this is valuable information for consumers and publishes information about consumer complaints and other airline compliance requirements, such as flight delays; mishandled baggage, wheelchairs, and scooters; oversales; reports of lost, injured or death of animals in air transportation; and customer service reports to the Transportation Security Administration, on its website at <https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel->

consumer-reports. DOT also posts all of the enforcement orders the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings has issued against air carriers on its website at <https://transportation.gov/airconsumer/enforcementorders>. The public may obtain additional information about air carriers under the Freedom of Information Act.

After consideration of the comments, the Department will finalize the proposed rule without change. This rule is necessary to protect the identity of confidential informants and confidential business information provided by air carriers, and protect the DOT's investigatory techniques. DOT will continue to provide individuals with access to information maintained in this system under the Freedom of Information Act, and under the Privacy Act, except to the extent that disclosure would reveal confidential informants, confidential business information, or reveal DOT's investigatory techniques.

#### **Regulatory Analysis and Notices:**

##### **A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

DOT considered the impact of this rulemaking action under Executive Orders 12866 and 13563 (January 18, 2011, "Improving Regulation and Regulatory Review"), and DOT Order 2100.6, "Policies and Procedures for Rulemakings." DOT has determined that this action will not constitute a significant regulatory action within the meaning of Executive Order 12866 and within the meaning of DOT regulatory policies and procedures. This rulemaking has not been reviewed by the Office of Management and Budget. This rulemaking will not result in any costs. Since these records would be exempt from certain

provisions of the Privacy Act, DOT would not have to expend any funds in order to administer those aspects of the Act.

### **B. Regulatory Flexibility Act**

DOT has evaluated the effect these changes will have on small entities and does not believe that this rulemaking will impose any costs on small entities because the reporting requirements themselves are not changed and because the rule applies only to information on individuals that is maintained by the Federal Government or that is already publicly available. Therefore, I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

### **C. National Environmental Policy Act**

DOT has analyzed the environmental impacts of this final action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR

771.117(c)(20). The purpose of this rulemaking is to amend the Appendix to DOT's Privacy Act regulations. The Department does not anticipate any environmental impacts and there are no extraordinary circumstances present in connection with this rulemaking.

**D. Executive Order 13132 (Federalism)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, Federalism, dated August 4, 1999, and it has been determined that it will not have a substantial direct effect on, or sufficient Federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the preparation of a Federalism Assessment is not necessary.

**E. Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because it would not have any effect Indian Tribal Governments, the funding and consultation requirements of Executive Order 13084 do not apply.

**F. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. DOT has determined that this action does not contain a collection of information requirement for the purposes of the PRA.

**G. Unfunded Mandates Reform Act**



Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. The UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A “Federal mandate” is a new or additional enforceable duty, imposed on any State, local, or tribal Government; or the private sector. If any Federal mandate causes those entities to spend, in aggregate, \$143.1 million or more in any one year (adjusted for inflation), an UMRA analysis is required. This final rule does not impose Federal mandates on any State, local, or tribal governments; or the private sector.

#### **H. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs**

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under EO 12866.

#### **I. Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a 'major rule', as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 49 CFR Part 10**

Penalties, Privacy.

In consideration of the foregoing, DOT amends part 10 of title 49, Code of Federal Regulations, as follows:

**PART 10—MAINTENANCE OF AND ACCESS TO RECORDS PERTAINING  
TO INDIVIDUALS**

1. The authority citation for part 10 continues to read as follows:

**Authority:** 5 U.S.C. 552a; 49 USC 322.

2. Amend Part II of appendix A by adding section H to read as follows:

**Appendix A to Part 10 - Exemptions**

Part II. Specific Exemptions

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H. The following systems of records are exempt from subsection (d) (Access to Records) of the Privacy Act, 5 U.S.C. 552a, to the extent that they contain investigatory material compiled for law enforcement purposes, in accordance with 5 U.S.C. 552a(k)(2):

1. Aviation Consumer Complaint Appropriation System, maintained by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in the Office of the Secretary (DOT/OST 102).

This exemption is justified because granting an individual access to investigatory records could interfere with the overall law enforcement process by revealing a sensitive investigative technique, or confidential sources or information.

Issued in Washington, DC, on December 4, 2019.

Elaine L. Chao,  
Secretary.

